

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

WHOLESALE FIREWORKS  
CORPORATION; AMERICAN FIREWORKS  
WAREHOUSE, LLC; PINK OR BLUE  
GENDER TEAM, INC. d/b/a GENDER  
REVEAL CELEBRATIONS; REFUGIO  
JIMENEZ; ANGELINA JIMENEZ; and DOES  
1-15.

Defendants.

Case No.: 5:23-cv-01805-MEMF-SP

**ORDER DENYING DEFENDANT  
WHOLESALE FIREWORKS  
CORPORATION’S MOTION TO DISMISS,  
GRANTING IN PART DEFENDANT  
WHOLESALE FIREWORKS  
CORPORATION’S MOTION TO STRIKE,  
AND DENYING DEFENDANT AMERICAN  
FIREWORKS WAREHOUSE LLC’S  
MOTION TO DISMISS [ECF NOS. 41, 42]**

Before the Court is the Motion to Dismiss Plaintiff’s First, Third, and Fourth Claim for Relief in the First Amended Complaint and Motion to Strike (ECF No. 41) filed by Defendant Wholesale Fireworks Corporation (“Wholesale Fireworks”) and the Motion to Dismiss Plaintiff’s First Amended Complaint for Lack of Personal Jurisdiction Pursuant to FRCP 12(b)(2) (ECF No. 42) filed by Defendant American Fireworks Warehouse, LLC (“AFW”). For the reasons stated herein, the Court hereby DENIES Wholesale Fireworks’s Motion to Dismiss, DENIES AFW’s Motion to Dismiss, and GRANTS IN PART Wholesale Fireworks’s Motion to Strike.

1       **I. Factual Allegations<sup>1</sup>**

2           Plaintiff United States of America (the “United States”) administers and manages federal  
3 lands through federal agencies such as the United States Department of Agriculture, Forest Service  
4 (“Forest Service”) and the Bureau of Land Management. FAC ¶¶ 1–2.

5           Defendant Wholesale Fireworks is a corporation, incorporated and headquartered in Ohio,  
6 that owned and operated a website through which it sold and distributed firework products, including  
7 gender reveal smoke bombs, throughout the United States. *Id.* ¶ 2. Defendant AFW is a limited  
8 liability corporation, incorporated in Delaware, with some operations in Ohio located at the same  
9 facilities used by Wholesale Fireworks, that also owned and operated a separate website that sold  
10 and shipped fireworks. *Id.* ¶ 3. Wholesale Fireworks was AFW’s exclusive distributor for certain  
11 products, including gender reveal smoke bombs. *Id.* ¶ 2.

12           Defendant Pink or Blue Gender Team, Inc. is a corporation, incorporated in Florida, doing  
13 business as Gender Reveal Celebrations (“GRC”) that also owned and operated a website that sold  
14 and distributed fireworks and smoke bombs for the purpose of celebrating gender reveals. *Id.* ¶ 4.  
15 GRC purchased such fireworks and smoke bombs from Wholesale Fireworks with the intent to sell  
16 them directly to consumers. *Id.* ¶ 11.

17           Defendants Refugio Jimenez and Angelina Jimenez (collectively, the “Jimenezes”) were  
18 individuals that both resided in San Bernardino County, California. *Id.* ¶ 5. On September 5, 2020,  
19 the Jimenezes used two gender-reveal smoke bombs, which they had purchased from GRC. *Id.* ¶ 24.  
20 The gender-reveal smoke bombs used by the Jimenezes ignited a fire in El Dorado Ranch Park (the  
21 “El Dorado Fire”), which subsequently spread to federal land, including the National Forest in San  
22 Bernardino County. *Id.* ¶¶ 23–24. The El Dorado Fire destroyed approximately 22,744 acres of land,  
23 damaged or destroyed twenty-four building structures, resulted in \$41,326,609 in fire suppression  
24 costs and resulted in the death of Forest Service firefighter, Charles Morton. *Id.* ¶ 32.

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27       <sup>1</sup> The following factual background is derived from allegations in Plaintiff’s First Amended Complaint, ECF  
28 No. 32 (“FAC”), unless otherwise indicated. For the purposes of these Motions, the Court treats these factual  
allegations as true, but at this stage of the litigation, the Court makes no finding on the truth of these  
allegations, and is therefore not—at this stage—finding that they *are* true.

1       **II.       Procedural History**

2               On September 5, 2023, the United States filed its Complaint in the present action against  
3 Wholesale Fireworks, ARW, GRC, and the Jimenezes. ECF No. 1. On December 18, 2023,  
4 Wholesale Fireworks filed a Motion to Dismiss the Complaint and Motion to Strike. ECF No. 28.  
5 That same day, AFW also filed a Motion to Dismiss the Complaint. ECF No. 29. In response, the  
6 United States filed its FAC on December 26, 2023. *See* FAC.

7               The United States’ FAC alleges the following causes of action: (1) Negligence against all  
8 Defendants; (2) California Health & Safety Code §§ 13001, 13007, 13009, and 13009.1 against the  
9 Jimenezes; (3) California Health & Safety Code §§ 13007, 13009, and 13009.1 against Wholesale  
10 Fireworks, AFW, and GRC; (4) Trespass by Fire<sup>2</sup> against all Defendants, and (5) Strict Product  
11 Liability against Wholesale Fireworks, AFW, and GRC. FAC ¶¶ 36–69.

12              On January 26, 2024, Wholesale Fireworks filed a Motion to Dismiss the United States’  
13 First, Third, and Fourth Claim for Relief in the First Amended Complaint and Motion to Strike. ECF  
14 No. 41 (“WF Motion”). On February 9, 2024, the United States filed its opposition to the WF  
15 Motion. ECF No. 46 (“Opposition WF Motion” or “Opp’n WF Motion”). On February 15, 2024,  
16 Wholesale Fireworks filed its reply to the United States’ opposition. (“WF Reply”). ECF No. 50.

17              On January 26, 2024, AFW filed a Motion to Dismiss the United States’ First Amended  
18 Complaint for Lack of Personal Jurisdiction Pursuant to FRCP 12(b)(2). ECF No. 42 (“AFW  
19 Motion”). On February 9, 2024, the United States filed its opposition to the AFW Motion. ECF No.  
20 45 (“Opposition AFW Motion” or “Opp’n AFW Motion”). On February 15, 2024, AFW filed its  
21 reply to the United States’ opposition. ECF No. 49 (“AFW Reply”).

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28               <sup>2</sup> The FAC erroneously labels this cause of action as the “Third Claim for Relief.” *See* FAC ¶ 52–58. The Court numerically refers to this and subsequent causes of action in the order that they appear in the FAC.

1       **III. Applicable Law**

2       **A. Motion to Dismiss Standard**

3       i.     Federal Rule of Civil Procedure 12(b)(6)

4       Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for “failure to  
5       state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “To survive a motion to  
6       dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
7       relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
8       *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff  
9       pleads factual content that allows the court to draw the reasonable inference that the defendant is  
10      liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

11      The determination of whether a complaint satisfies the plausibility standard is a “context-  
12      specific task that requires the reviewing court to draw on its judicial experience and common sense.”  
13      *Id.* at 679. Generally, a court must accept the factual allegations in the pleadings as true and view  
14      them in the light most favorable to the plaintiff. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir.  
15      2017); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). But a court is “not bound to  
16      accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting  
17      *Twombly*, 550 U.S. at 555).

18      As a general rule, leave to amend a dismissed complaint should be freely granted unless it is  
19      clear the complaint could not be saved by any amendment. Fed. R. Civ. P. 15(a); *Manzarek v. St.*  
20      *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

21      ii.    Federal Rule of Civil Procedure 12(b)(2)

22      A defendant can move to dismiss for lack of personal jurisdiction under Rule 12(b)(2) of the  
23      Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(2). The party asserting the existence of  
24      jurisdiction bears the burden of establishing it. *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d  
25      857, 862 (9th Cir. 2003). If the court does not require an evidentiary hearing, a plaintiff “need only  
26      make a prima facie showing of the jurisdictional facts.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015  
27      (9th Cir. 2008) (internal quotation marks omitted).

1 Uncontroverted allegations in the complaint must be taken as true, and “[c]onflicts between  
2 parties over statements contained in affidavits must be resolved in the plaintiff’s favor.”  
3 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Depending on the  
4 nature and extent of a defendant’s contacts, if any, with a forum state, the appropriate exercise of  
5 personal jurisdiction may be either general—that is, the party is subject to any claims in that  
6 forum—or specific—that is, the party is subject only to claims arising out of its forum-related  
7 activities. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

8 To establish personal jurisdiction over a defendant, a plaintiff must show both that the long-  
9 arm statute of the forum state confers personal jurisdiction over an out-of-state defendant, and that  
10 the exercise of jurisdiction is consistent with federal due process requirements. *Pebble Beach Co. v.*  
11 *Caddy*, 453 F.3d 1151, 1154–55 (9th Cir. 2006). California’s long-arm statute is coextensive with  
12 the scope of what is permitted by due process. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell &*  
13 *Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003) (citing Cal. Civ. Proc. Code § 410.10).  
14 Constitutional due process requires that jurisdiction be exercised over a nonresident party only if that  
15 party has “minimum contacts” with the forum, such that the exercise of jurisdiction “does not offend  
16 traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310,  
17 316 (1945) (internal quotation marks omitted); *accord Burger King Corp. v. Rudzewicz*, 471 U.S.  
18 462, 464 (1985).

19 “Even if a defendant has not had continuous and systematic contacts with the state sufficient  
20 to confer ‘general jurisdiction,’ a court may exercise ‘specific jurisdiction.’” *Dole Food Co., Inc. v.*  
21 *Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). Specific jurisdiction exists where the claim for relief  
22 arises directly from a defendant’s contacts with the forum state. *Am. Tel. & Tel. Co. v. Compagnie*  
23 *Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996). For a court to exercise specific jurisdiction  
24 over a defendant: “(1) the non-resident defendant must purposefully direct his activities or  
25 consummate some transaction with the forum or resident thereof; *or* perform some act by which he  
26 purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking  
27 the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the  
28 defendant’s forum-related activities; and (3) the exercise of jurisdiction must comport with fair play

1 and substantial justice, i.e. it must be reasonable.” *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir.  
2 2015) (emphasis added).

3 “[W]here . . . a case sounds in tort,” the court is directed to “employ the purposeful direction  
4 test.” *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1069 (9th Cir. 2017). In tort cases,  
5 the Ninth Circuit requires a showing of purposeful direction, rather than purposeful availment.  
6 *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011). Purposeful direction  
7 is analyzed under the *Calder* “effects” test, which requires the defendant to have “(1) committed an  
8 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is  
9 likely to be suffered in the forum state.” *Id.* (citing *Calder v. Jones*, 465 U.S. 783, 789–90 (1984)).  
10 When, however, a case sounds in contract, the court must apply the purposeful availment test. *Glob.*  
11 *Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma*, 972 F.3d 1101, 1107 (9th Cir.  
12 2020) (“Purposeful availment generally provides a more useful frame of analysis for claims  
13 sounding in contract, while purposeful direction is often the better approach for analyzing claims in  
14 tort.”). Although both tests are relevant when “both contract and tort claims are at issue,” *id.* (citing  
15 *Picot*, 780 F.3d at 1212), each test hinges on the same question: “whether defendants have  
16 voluntarily derived some benefit from their interstate activities such that they will not be haled into a  
17 jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts,” *Glob. Commodities*  
18 *Trading Grp.*, 972 F.3d at 1107 (quotation marks omitted).

19 **B. Motion to Strike Standard**

20 Federal Rule of Civil Procedure 12(f) provides that a court may “strike from a pleading an  
21 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P.  
22 12(f). The function of a motion to strike is “to avoid the expenditure of time and money that must  
23 arise from litigating spurious issues by dispensing with those issues prior to trial.” *Whittlestone, Inc.*  
24 *v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (internal quotation marks omitted). Motions to  
25 strike “are generally regarded with disfavor because of the limited importance of pleading in federal  
26 practice,” and they “are generally not granted unless it is clear that the matter sought to be stricken  
27 could have no possible bearing on the subject matter of the litigation.” *Gaines v. AT&T Mobility*  
28 *Servs., LLC*, 424 F. Supp. 3d 1004, 1014 (S.D. Cal. 2019) (internal quotation marks omitted).

1 **IV. Discussion**

2 **A. Motion to Dismiss under Rule 12(b)(6)**

3 Wholesale Fireworks moves to dismiss the claims of the United States for (1) negligence; (2)  
4 violations of California Health and Safety Code sections 13007, 13009, and 13009.1; and (3)  
5 violation of California Civil Code section 3346. WF Motion at 1–3. Additionally, Wholesale  
6 Fireworks moves to strike any reference to (1) California Health and Safety Code sections 13007,  
7 13009, and 13009.1; (2) negligence *per se* and *res ipsa loquitur*; and (3) prayer for double or triple  
8 damages pursuant to California Civil Code section 3346. *Id.* at 10–11.

9 i. The United States has adequately pleaded its negligence claim (Claim No. 1).

10 Wholesale Fireworks argues that the cause of action for negligence should be dismissed for  
11 failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). WF Motion at 5.  
12 Specifically, Wholesale Fireworks argues that the United States fails to plead facts that sufficiently  
13 establish any viable claim of *res ipsa loquitur* and negligence *per se*. *Id.* at 5–7.

14 The United States argues that the claim for negligence should not be dismissed because the  
15 FAC pleads facts that sufficiently establish a claim for ordinary negligence. Opp’n WF Motion at 2.  
16 Specifically, the United States argues that the claim should not be dismissed because (1) it does not  
17 exclusively rely on the theories of *res ipsa loquitur* and negligence *per se*, and (2) *res ipsa loquitur*  
18 and negligence *per se* are legal principles of evidentiary presumption, not claims that the FAC needs  
19 to plead. *Id.* at 2–5. Wholesale Fireworks argues that the United States fails to plead any facts that  
20 support these theories of negligence. WF Motion at 5–7.

21 The United States argues that a motion to dismiss should be granted only when the complaint  
22 “lacks ‘a cognizable legal theory’ or sufficient facts to support a legal claim.” Opp’n WF Motion at  
23 2. The United States cites to *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir.  
24 1988) in support. Opp’n WF Motion at 2. The *Balistreri* court reasoned that “dismissal can be based  
25 on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable  
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1 legal theory.”<sup>3</sup> *Balistreri*, 901 F.2d at 699. Based on this, the United States argues that the FAC  
2 sufficiently pleads facts for ordinary negligence and that the claim for negligence should not be  
3 dismissed. Opp’n WF Motion at 2.

4 In California, the elements of negligence are “(1) [a] defendant’s obligation to conform to a  
5 certain standard of conduct for the protection of others against unreasonable risks (duty); (2) failure  
6 to conform to that standard (breach of the duty); (3) a reasonably close connection between the  
7 defendant’s conduct and resulting injuries (proximate cause); and (4) actual loss (damages).”  
8 *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009). As discussed below, the FAC sets forth  
9 sufficient factual matter, accepted as true, to state a facially plausible claim for negligence.

10 First, the FAC alleges that Wholesale Fireworks had a duty to safely design, manufacture,  
11 and label the Jimenezes’s gender reveal smoke bombs in accordance with Federal Consumer Product  
12 Safety Laws. *See e.g.*, FAC ¶¶ 27, 37. The United States also alleges that Wholesale Fireworks had a  
13 duty to properly warn consumers of the dangers associated with the smoke bombs, including  
14 providing any labeling required by California and federal law. *See e.g.*, FAC ¶ 27. Based on these  
15 allegations, it is plausible that Wholesale Fireworks had a duty of care imposed by California and  
16 federal law.

17 Second, the United States alleges Wholesale Fireworks’s failure to properly design and  
18 manufacture the gender reveal smoke bombs resulted in the emission of excessive sparks, flames,  
19 and molten materials. *See e.g.*, FAC ¶ 40. The FAC also alleges that Wholesale Fireworks failed to  
20 adequately provide labeling to warn of dangers or instruct on the safe use of the gender reveal smoke  
21 bombs. *Id.* ¶ 41. Additionally, the gender reveal smoke bombs failed to bear the California State Fire  
22 Marshall Registration Seal, rendering them illegal in California. *Id.* ¶ 25. Accordingly, the Court  
23 finds that the United States has plausibly alleged that Wholesale Fireworks breached the duty of care  
24 imposed by California and federal law.

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26 <sup>3</sup> Although much of *Balistreri* was overturned by *Iqbal/Twombly*, this holding was not. *See Twombly*, 550  
27 U.S. at 560–63 (overturning *Conley v. Gibson*, 355 U.S. 41 (1957), which *Balistreri* cited); *Iqbal*, 556 U.S. at  
28 669–70 (further clarifying the post-*Conley* standard); *see also Balistreri*, 901 F.2d at 699 (citing *Conley* for  
the general standard as to Motions to Dismiss, but explaining that “[d]ismissal can be based on the lack of a  
cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory” without  
reliance upon *Conley*).



1 Third, the United States alleges that Wholesale Fireworks's defective design, manufacturing,  
2 and labeling of the gender reveal smoke bombs resulted in the emission of excessive sparks, flames,  
3 and molten materials that were a substantial factor in causing the El Dorado Fire. *See e.g.*, FAC ¶¶  
4 27, 31. Considering these allegations, it is plausible that the gender reveal smoke bombs' defective  
5 design, manufacturing, and labeling proximately caused the United States' alleged damages.

6 Lastly, the FAC alleges that the El Dorado Fire destroyed about 22,744 acres of annual  
7 grasses, brush, and timber, and damaged or destroyed nine structures and 15 outbuildings.  
8 Additionally, the United States also alleges that the Forest Service sustained suppression costs,  
9 resource damages, and burned area emergency response costs of at least \$41,326,609. *See e.g.*, FAC  
10 ¶ 32. Therefore, the Court finds it plausible that the United States suffered actual damages. Given  
11 these allegations, the Court finds that the United States has sufficiently pleaded facts that establish a  
12 claim for ordinary negligence.<sup>4</sup>

13 For the reasons stated above, the Court DENIES Wholesale Fireworks's Motion to Dismiss  
14 as to this claim. Accordingly, the Court also DENIES Wholesale Fireworks's Motion to Strike any  
15 reference to *res ipsa loquitur* and negligence *per se* because the United States has adequately stated a  
16 claim for negligence and it is of no moment at this stage whether it can prove its factual allegations  
17 using either of those doctrines.

- 18 ii. The United States has adequately pleaded its claims under California Health and  
19 Safety Code Sections 13007, 13009, and 13009.1 (Claim No. 3).

20 Wholesale Fireworks argues that the United States' third cause of action should be dismissed  
21 for the failure to state a claim. WF Motion at 7–9. Specifically, Wholesale Fireworks argues that the  
22 United States failed to plead facts that sufficiently establish any viable claim under the statutory  
23 language of California Health and Safety Code sections 13007, 13009, and 13009.1. *Id.*

24 The United States argues that the statutory language of the specified California Health and  
25 Safety Code sections facially encompass the act of selling a defective product used to set a fire and  
26 that it sufficiently pleaded such facts in the FAC. Opp'n WF Motion at 6. Specifically, the United  
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28 <sup>4</sup> The Court need not to address the issues of *res ipsa loquitur* and negligence *per se* because the facts pleaded sufficiently support a claim of ordinary negligence.

1 States argues that whether defective labeling constitutes the act of “allowing a fire to be set” is an  
2 issue of material fact. *Id.*

3 California Health and Safety Code section 13007 provides as follows, “[a]ny person who  
4 personally or through another willfully, negligently, or *in violation of law*, sets fire to, *allows fire to*  
5 *be set to*, or allows a fire kindled or attended by him to escape to, the property of another, whether  
6 privately or publicly owned, is liable to the owner of such property for any damages to the property  
7 caused by the fire.” (emphasis added).<sup>5</sup>

8 The Court finds that the United States has adequately pleaded that Wholesale Fireworks’s  
9 defective labeling, in violation of state and federal law, allowed the El Dorado Fire to be set.  
10 Wholesale Fireworks argues that it is not liable for causing the El Dorado Fire because the FAC  
11 alleges that the fire was caused by the Jimenezes. WF Motion at 2. Wholesale Fireworks also argues  
12 that the FAC’s allegations fail to demonstrate any conduct in connection with the El Dorado Fire. *Id.*  
13 at 3. However, contrary to Wholesale Fireworks’s argument, there is ample case law holding that  
14 multiple entities can be held liable for the causation of the same injury. For example, in *Ashland v.*  
15 *Ling-Temco-Vought, Inc.*, the court determined that liability could apply to multiple defendants who  
16 share responsibility for the cause of an accident. 711 F.2d 1431, 1438 (9th Cir. 1983). The *Ashland*  
17 court provided as an example a scenario where “a defendant product manufacturer has the duty to  
18 use reasonable care in *designing and constructing a product*, and an operator of the product has to  
19 the duty to use it, as constructed, in a reasonable manner to avoid injury to others.” *Id.* at 1439  
20 (emphasis added). The Court finds that just as in the example discussed by the *Ashland* court, the  
21 facts alleged in the FAC plausibly set forth a claim where multiple defendants could be liable.

22 In the FAC, the United States alleges that Wholesale Fireworks violated California Health  
23 and Safety Code section 13007. *Id.* The FAC also alleges that Wholesale Fireworks had a duty to  
24 safely design, manufacture, and label Jimenezes’s gender reveal smoke bombs, and that Wholesale  
25 Fireworks failed to adequately provide warnings or instructions *despite knowing, or having reason to*  
26 *know* the smoke bombs were dangerous when misused. *See e.g.*, FAC ¶¶ 36–48 (emphasis added).

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28 <sup>5</sup> California Health and Safety Code sections 13009 and 13009.1 use substantially similar statutory language to California Health and Safety Code section 13007.

1 The FAC further alleges that Wholesale Fireworks should have been aware of such defects because  
2 of its training in the fireworks industry. *Id.* at ¶ 29.

3 Construing these allegations as true, as the Court must when determining the survival of a  
4 claim under Federal Rule of Civil Procedure 12(b)(6), the Court finds that it is plausible that  
5 Wholesale Fireworks allowed the fire to occur. If an entity knows or has reason to know of the risks  
6 that may result from the defective labeling or design of its product, yet fails to adequately provide  
7 such labeling, it follows that the entity consequently allowed for that danger to ensue. Wholesale  
8 Fireworks knew or had reason to know of the risks of fire that may result from the defective labeling  
9 or design of the gender reveal smoke bombs given its training in the industry. Wholesale Fireworks  
10 failed to adequately provide warnings of the risk of fire that may ensue from the misuse of its  
11 product, despite knowing or having reason to know of the risks of such danger. Further, this failure  
12 was in violation of the law. Therefore, Wholesale Fireworks, in essence, allowed the fire to occur.

13 At the hearing, AFW argued to the Court that they adequately labeled the gender reveal  
14 smoke bombs, referencing a photograph of the smoke bombs at issue. *See e.g.*, FAC ¶25. However,  
15 the Court finds that whether AFW's labeling provided adequate warning is not an issue to be  
16 determined as a matter of law at this stage. For this reason, the Court DENIES Wholesale  
17 Fireworks's Motion to Dismiss as to this claim. Accordingly, the Court also DENIES Wholesale  
18 Fireworks's Motion to Strike any reference to California Health and Safety Code sections 13007,  
19 13009, and 13009.1.

20 iii. The United States has adequately pleaded its trespass by fire claim (Claim No. 4).

21 Wholesale Fireworks argues that the United States' fourth cause of action should be  
22 dismissed for failure to state a claim under California Civil Code section 3346. WF Motion at 9.  
23 Specifically, Wholesale Fireworks argues that California Civil Code section 3346 is a remedy statute  
24 setting forth the recovery of interest and does not give the right to private action nor provide a basis  
25 for statutory liability. *Id.* Wholesale Fireworks also argues that the FAC alleges a claim for trespass  
26 by fire only pursuant to the statute. WF Reply at 8.

27 The United States concedes that California Civil Code section 3346 is a remedy statute for  
28 the recovery of interest. Opp'n WF Motion at 7. However, the United States argues that the statute

1 provides a special remedy for an underlying tort of trespass when it involves fire. *Id.* The United  
2 States also argues that the potential inapplicability of California Civil Code section 3346’s special  
3 remedy does not mean that the claim for trespass by fire fails as a matter of law. *Id.*

4 First, Wholesale Fireworks’s argument that the United States does not separately allege a  
5 common law claim of trespass fails. WF Reply at 8. In its reply, Wholesale Fireworks argues that the  
6 “[t]respass by [f]ire cause of action set forth within the FAC relies *exclusively* on a remedy statute  
7 which cannot form a basis of relief.” *Id.* (emphasis added). However, in the FAC, the United States  
8 alleges that “Defendants are *also* liable to Plaintiff for wrongful injury to its timber, trees, and  
9 underwood pursuant to California Civil Code section 3346.” *See e.g.*, FAC ¶ 58 (emphasis added).  
10 The word “also” leads the Court to believe that the United States is alleging an underlying tort of  
11 trespass by fire in addition to seeking the double damages provided by California Civil Code section  
12 3346. The Court also finds that California Civil Code section 3346 provides a special remedy for  
13 trespass where the trespass includes conditions involving fire. Opp’n WF Motion at 7.

14 Second, the Court finds that the United States has sufficiently pleaded facts that satisfy the  
15 common law claim of trespass by fire. “The elements of trespass are: (1) the plaintiff’s ownership or  
16 control of the property; (2) the defendant’s intentional, reckless, or negligent entry on to the  
17 property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the  
18 defendant’s conduct was a substantial factor in causing the harm.” *Ralphs Grocery Co. v. Victory*  
19 *Consultants, Inc.*, 17 Cal.App.5th 245, 261 (2017). Under California law, “[a] trespass to property is  
20 the unlawful interference with its possession.” *Elton v. Anheuser-Busch Beverage Grp., Inc.*, 50 Cal.  
21 App. 4th 1301, 1306 (1996). “The interference need not take the form of a personal entry onto the  
22 property by the wrongdoer.” *Id.* If negligently inflicted, a fire resulting in actual damages may  
23 constitute a trespass. *Id.* at 1307.

24 The Court finds that the allegations in the FAC plausibly allege that Wholesale Fireworks  
25 unlawfully interfered with the United States’ possession of land and that the negligently designed  
26 and manufactured smoke bombs resulted in actual damages. First, the United States alleges that it  
27 manages, controls, and supervises the land in San Bernardino County where the El Dorado Fire  
28 occurred. *See e.g.*, FAC ¶ 1. Second, the United States alleges that Wholesale Fireworks’s

1 defectively designed and manufactured gender reveal smoke bombs ignited the El Dorado Fire,  
2 which subsequently spread to the National Forest in San Bernardino County. *Id.* at ¶¶ 23, 27. Third,  
3 the United States alleges that the El Dorado Fire was not ignited with the permission of the United  
4 States. *Id.* at ¶ 35. Fourth, the United States also alleges that the El Dorado Fire destroyed 22,744  
5 acres of land, destroyed or damaged nine structures and fifteen outbuildings, and resulted in the loss  
6 of use, recreation, habitat, and wildlife. *Id.* at ¶¶ 32–33. Fifth, the United States alleges that  
7 Wholesale Fireworks’s defective design, manufacturing, and labeling of the gender reveal smoke  
8 bombs caused the emission of excessive sparks, flames, and molten materials that were a substantial  
9 factor in causing the El Dorado Fire. *See e.g.*, FAC ¶¶ 27, 31.

10 Nevertheless, the California Supreme Court has held that California Civil Code section 3346,  
11 which authorizes *double* damages for wrongful injuries to timber, trees, or underwood where the  
12 trespass causing the injuries was casual or involuntary, does not apply to damage to property  
13 resulting from *fires* negligently set. *See Scholes v. Lambirth Trucking Co.* 458 P.3d 860, 865 (2020);  
14 *see also Gould v. Madonna*, 5 Cal. App. 3d 404, 407 (1970) (finding no indication that California  
15 Civil Code section 3346’s double damages provisions are applicable to negligently caused fire  
16 damage). The United States does not allege any direct or intentional harm to trees, and therefore,  
17 Section 3346 does not apply. *See Scholes*, 458 P.3d at 873–874 (finding that California Civil Code  
18 section 3346’s treble damages provisions are only applicable to direct, intentional injuries to trees).  
19 The fact that the United States is not entitled to relief under Section 3346 however, does not mean  
20 that the claim for trespass by fire fails as a matter of law. For the reasons stated above, the claim was  
21 properly pleaded.

22 For the foregoing reasons, the Court DENIES Wholesale Fireworks’s Motion to Dismiss as  
23 to this claim.<sup>6</sup>

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25 ///

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27 <sup>6</sup>Given that the Court finds that California Civil Code section 3346’s damages provisions are inapplicable, it  
28 follows that any reference to the statute is “immaterial” under Rule 12(f). Accordingly, the Court GRANTS  
Wholesale Fireworks’ Motion to Strike in part as it pertains to California Code Civil Code section 3346.

1           **B. Motion to Dismiss under Rule 12(b)(2)**

2           AFW argues that the FAC should be dismissed under Federal Rule of Civil Procedure  
3           12(b)(2) for lack of personal jurisdiction because the United States cannot establish that the Court  
4           has either general or specific jurisdiction over AFW. AFW Motion at 1–2. Specifically, AFW argues  
5           that general jurisdiction cannot be established because (1) AFW’s state of incorporation is Delaware  
6           and (2) AFW’s principal place of business is in Maryland. *Id.* at 6. In its response, the United States  
7           seems to concede to this argument, given its failure to address this issue.

8           AFW also argues that the Court lacks specific jurisdiction over AFW because it has no  
9           sufficient contacts with California. AFW Motion at 1. Specifically, AFW maintains that the United  
10          States has failed to satisfy the Ninth Circuit’s three-prong specific jurisdiction test: (1) that the  
11          defendant purposefully availed itself of the forum state; (2) that the claim arises out of the  
12          defendant’s forum-related activities; and (3) that the exercise of personal jurisdiction comport with  
13          fair play and substantial justice. *Id.* at 6.

14          However, the United States contends that the Court has specific jurisdiction over AFW  
15          because AFW purposefully availed itself of the benefits of California markets through its exclusive  
16          partnership with Wholesale Fireworks. Opp’n AFW Motion at 4. Specifically, the United States  
17          seems to proceed on the “stream of commerce” theory, arguing that AFW, through its exclusive  
18          partnership with Wholesale Fireworks, has done “something more” than simply placing a product  
19          into the nationwide stream of commerce.

20                i.   The Court considers the parties’ supporting affidavits and exhibits.

21          As an initial matter, the Court addresses AFW’s argument that the United States cannot rest  
22          on “barebone allegations.” AFW cites to *In Re Boon Global Ltd.*, 923 F.3d 643 (9th Cir. 2019) to  
23          support this argument. In *Boon*, the Ninth Circuit determined that the party asserting jurisdiction is  
24          unable to rely on the bare allegations of the complaint, but that undisputed allegations must be taken  
25          as true. *Id.* at 650. Here, both parties submit affidavits and exhibits to support their arguments.  
26          Courts may consider affidavits on a Rule 12(b)(2) motion to dismiss and cannot “assume the truth of  
27          allegations in a pleading which are contradicted by affidavit.” *LNS Enters. LLC v. Cont’l Motors,*  
28          *Inc.*, 22 F.4th 852, 858 (9th Cir. 2022) (quoting *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d



1 1280, 1284 (9th Cir. 1977)). Where the parties have, as here, both submitted affidavits, “[c]onflicts  
2 between the parties over statements contained in affidavits must be resolved in the plaintiff’s favor.”  
3 *LNS Enters.*, 22 F.4th at 858. Accordingly, the Court considers the affidavits and supporting  
4 evidence. The Court construes all uncontroverted allegations made in affidavits in favor of the  
5 United States. But as the Court “may not assume the truth of allegations in a pleading which are  
6 contradicted by affidavit,” it does not consider any controverted facts. *Mavrix Photo Inc.*, 647 F.3d  
7 at 1223 (quotation marks omitted).

8 ii. The United States has adequately pleaded that AFW purposefully availed itself of  
9 California.

10 Purposeful availment is typically defined as “actions taking place in the forum that invokes  
11 the benefits and protections of the laws in the forum.” *Schwarzenegger*, 374 F.3d at 803.

12 The United States appears to urge the Court to adopt the “stream of commerce” theory,  
13 which is typically analyzed under the first prong of the specific jurisdiction analysis. *See LNS*  
14 *Enters.*, 22 F.4th at 859-60; *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 459 (9th  
15 Cir. 2007); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881-82 (2011) (“This Court has stated  
16 that a defendant’s placing goods into the stream of commerce ‘with the expectation that they will be  
17 purchased by consumers in the forum State’ may indicate purposeful availment.” (citing *World-Wide*  
18 *Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980)). But it is well-established that “[p]lacing a  
19 product into the stream of commerce—even if the defendant is aware that the stream of commerce  
20 may or will sweep the product into the forum state—does not convert the mere act of placing the  
21 product into the stream of commerce into an act of purposeful availment.” *LNS Enters.*, 22 F.4th at  
22 859-60 (quotation marks omitted) (citing *Holland Am. Line*, 485 F.3d at 459). “[S]omething more” is  
23 needed. *LNS Enters.*, 22 F.4th at 860 (citing *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102,  
24 111 (1987)).

25 In response, AFW argues that the United States cannot establish a “pure stream of commerce  
26 theory.” AFW Motion at 10. AFW cites to *Asahi Metal Industry Co., Limited v. Superior Court of*  
27 *California, Solano County*, 480 U.S. 102 (1987) in support. In *Asahi*, the Supreme Court issued  
28 divided opinions on the scope of the “stream of commerce” theory first established in *World-Wide*



1 *Volkswagen Corp. v. Woodson*, 444 US 286 (1980). *Asahi*, 480 U.S. at 108–116. The Supreme Court  
2 provided two different suggestions to approaching the scope of stream of commerce: (1) the “stream-  
3 of-commerce plus” theory issued by Justice Sandra O’ Connor and (2) the “stream-of-commerce”  
4 theory issued by Justice Brennan. *Id.* The “stream of commerce plus” theory reasons that “the  
5 placement of a product into the stream of commerce, *without more*, is not an act of the defendant  
6 purposefully directed toward the forum state.” *Id.* at 112 (emphasis added). Justice O’ Connor  
7 explained that additional conduct that may include “designing the product for the forum state’s  
8 market, advertising in the forum state, or *marketing the product through a distributor who has*  
9 *agreed to serve as a sales agent in the forum State.*” *Id.* (emphasis added).

10 The Ninth Circuit has adopted the “stream-of-commerce-plus” test. *See Yamashita v. LG*  
11 *Chem, Ltd.*, 62 F. 4th 496, 503 (9th Cir. 2023) (stating that under the Ninth Circuit’s law, “[t]he  
12 placement of a product into the stream of commerce, without more, is not an act purposefully  
13 directed toward a forum state,’ even if the defendant is ‘aware that the stream of commerce may or  
14 will sweep the product into the forum state.’”).

15 The United States argues that AFW and Wholesale Fireworks entered an exclusive  
16 distributorship relationship and that AFW, through its partnership with Wholesale Fireworks,  
17 purposefully directed itself to California.

18 First, the United States alleges that Wholesale Fireworks’s websites and social media  
19 advertise AFW as its in-house, exclusive product line, designed by Wholesale Fireworks’s design  
20 team. *See e.g.*, FAC ¶ 16. The United States supports these allegations with a screenshot of  
21 Wholesale Fireworks’s website “wfboom.com” provided by a declaration based upon Assistant  
22 United States Attorney Yujin Chun’s personal knowledge. Declaration of Yujin Chun (“Chun  
23 Decl.”), ECF No. 45-1 at ¶ 2, Ex. A. The screenshot shows Wholesale Fireworks’s “About Us”  
24 description, which states “Wholesale Fireworks also offers its *own AFW product line*. AFW is an  
25 *exclusive line* of high-performance items that are *designed in-house . . . by our* talented design  
26 team.” *See id.* (emphasis added). The United States also supports these allegations with a screenshot  
27 of Wholesale Fireworks’s “LinkedIn” profile, which states “Wholesale Fireworks offers its *own*  
28 *AFW product line*, an *exclusive line* of high-performance items that are individually chosen for *our*

1 customers.” See Chun Decl., Ex. B. (emphasis added). Additionally, the United States alleges that  
2 AFW attested under the penalty of perjury, to the United States Patent and Trademark Office, that its  
3 corporate address is “2665 North Main Street Hubbard, Ohio.” See e.g., FAC ¶ 17.

4 Second, the United States further alleges that AFW’s corporate address is the same address  
5 as Wholesale Fireworks’s office and facilities. *Id.* The United States supports these allegations with  
6 a copy of a search made on the United States Patent and Trademark Office’s website. Chun Decl. at  
7 ¶ 2, Ex. C. The search shows that the “Owner Name” of the “AFW” trademark is “American  
8 Fireworks Warehouse, LLC” and that the “Owner Address” is “2665 North Main Street Hubbard,  
9 [Ohio, United States] 44425.” See Chun Decl., Ex. C.

10 Lastly, the FAC alleges that Wholesale Fireworks “target[ed] California companies and  
11 consumers, advertise[d] [its] familiarity with California fireworks laws, and induce[d] the purchase  
12 of products to and distribution to California.” See e.g., FAC ¶ 13. The United States also alleges that  
13 Wholesale Fireworks sought to advertise and license AFW’s products and marks. *Id.*

14 Here, Wholesale Fireworks clearly and explicitly advertised AFW as its exclusive product  
15 line designed in-house by “[its] design team.” Even more, Wholesale Fireworks advertised AFW as  
16 exclusive products that were individually chosen for “[its] customers.” Wholesale Fireworks’s  
17 characterization of AFW as its exclusive product line for its customers suggests that AFW and  
18 Wholesale entered an exclusive distributorship. Furthermore, the fact that Wholesale Fireworks and  
19 AFW share the same corporate address supports this interpretation. Accordingly, as a partner to the  
20 exclusive distributorship, AFW knew or had reason to know that Wholesale Fireworks advertised its  
21 gender reveal smoke bombs to the California retailers and to out of state third-party retailers, such as  
22 GRC, who subsequently sell and distribute AFW’s products to California consumers. As stated  
23 previously in *Asahi*, the stream-of-commerce plus theory requires additional conduct directed toward  
24 a forum state, which may include “marketing the product through a distributor who has agreed to  
25 serve as a sales agent in the forum State.” *Asahi*, 480 U.S. at 112 (emphasis added). Given these  
26 allegations, the Court views AFW’s conduct as “something more” in the context of *Asahi*.

27 The Court notes that AFW provides the Declaration of April Frederici (“Frederici Decl.”),  
28 ECF No. 42-2, the Registered Agent and Manager of AFW. Based upon her personal knowledge,

Frederici declared that AFW does not participate in Wholesale Fireworks's sales or marketing nor is aware of Wholesale Fireworks's customers. Frederici Decl. at ¶ 18. However, these allegations proffered by AFW fail to place into dispute the FAC's allegations and shift the burden onto the United States. The Court reasons that even if AFW does not participate in Wholesale Fireworks's sales or marketing tactics, it still remains plausible that AFW entered into an exclusive distributorship with Wholesale Fireworks for the sales of AFW's gender reveal smoke bombs. Likewise, even if AFW is not aware of who Wholesale Fireworks's particular customers are, it still remains plausible that AFW gave Wholesale Fireworks consent to sell the gender reveal smoke bombs across the United States, including in California.

At the hearing, AFW argued that the United States' could not rely solely on AFW's working relationship with Wholesale Fireworks to constitute "something more" in the context of the stream of commerce plus test. However, the United States rebutted by pointing out to additional allegations in the FAC that further satisfy the test.

First, the United States points out to allegations that AFW, as a supplier, has obligations to indemnify and defend Wholesale Fireworks in connection with any claims related to the gender reveal smoke bombs. *See e.g.*, FAC ¶ 20. Moreover, the United States alleges that AFW and Wholesale Fireworks entered a co-venturer relationship. *Id.* at 15. Given these allegations, the Court finds it plausible that AFW and Wholesale Fireworks' relationship provides a separate basis that satisfies the stream of commerce plus test. An indemnifying party that subjects itself to a duty to indemnify and defend another party places itself under a significant monetary risk. It follows that parties that do not place themselves under such risks unless there is a substantial business relationship.

Additionally, the United States alleges that AFW and Wholesale Fireworks jointly advertise their gender reveal smoke bombs. The Court finds that AFW and Wholesale Fireworks's joint advertisements constitute "something more" in the context of the stream of commerce plus test. *See Asahi*, 480 U.S. at 112 (explaining that advertising in the forum state may constitute additional conduct under the stream of commerce plus). As stated above, AFW's Manager declared that AFW does not participate in Wholesale Fireworks's sales or marketing nor is aware of Wholesale

1 Fireworks’s customers. Frederici Decl. at ¶ 18. Again, the Court reasons that even if AFW does not  
2 participate directly in Wholesale Fireworks’s marketing tactics, it still remains plausible that AFW  
3 and Wholesale Fireworks’s jointly advertised the gender reveal smoke bombs. At the hearing, AFW  
4 clarified to the Court that the intention behind the relevant language in Frederici’s declaration was to  
5 show that AFW was in no way involved with the advertisement of the smoke bombs. However, the  
6 Court finds this to be unpersuasive. If AFW truly intended to show the Court that they had not been  
7 involved in advertising the smoke bombs, Frederici’s declaration should have stated so explicitly.

8 Accordingly, the Court finds that AFW purposefully availed itself of jurisdiction in the State  
9 of California.

10 iii. The United States’ claim arises out of and relates to AFW’s forum-related activities.

11 In determining whether claims arise out of a defendant’s forum-related activities, the Court  
12 must utilize a “but for” test. *See Harris*, 328 F.3d at 1127. The United States argues that AFW’s  
13 tortious conduct in one forum can have the effect of tortious conduct in another. The United States’  
14 FAC alleges the AFW’s defective design and labeling of the Jimenezes’s gender reveal smoke  
15 bombs and the conscious disregard of the dangers of such defects substantially caused the El Dorado  
16 Fire. *See e.g.*, FAC ¶¶ 27, 29. The Court finds that the United States has sufficiently pleaded facts  
17 that satisfy “but for” causation. Accordingly, the Court finds that the United States’ claims arise out  
18 of and relate to AFW’s forum-related activities.

19 iv. Jurisdiction over AFW is not unreasonable.

20 The United States argues that this Court’s exercise of jurisdiction over AFW is reasonable.  
21 Opp’n AFW Motion at 15. The Court must consider the following factors to assess the  
22 reasonableness of exercising jurisdiction: “(1) the extent of a defendant’s purposeful interjection into  
23 the forum state’s affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of  
24 conflict with the sovereignty of the defendant’s home state; (4) the forum state’s interest in  
25 adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the  
26 importance of the forum to the plaintiff’s interests in convenient and effective relief; and (7) the  
27 existence of an alternative forum.” *See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain*  
28 *Co.*, 284 F.3d 1114, 1125 (9th Cir. 2002).

1 The Court finds that jurisdiction over AFW is not unreasonable. California has an in interest  
2 in adjudicating the dispute in this matter as AFW's conduct allegedly violated California State laws  
3 and regulations, destroying approximately 22,744 acres of annual grass, brush, and timber (all  
4 located in California) as a result. *See e.g.*, FAC ¶ 31. Further, the El Dorado Fire caused  
5 approximately \$41,326,609 in damages. *Id.* at ¶ 32. Given that the Central District Court of  
6 California resides in the same region that suffered such magnitude of damage, it is clear that this  
7 Court and the State of California have an interest in adjudicating the dispute.

8 Further, adjudicating the matter in the Central District Court of California would provide the  
9 most efficient judicial resolution of the controversy. Should this Court deny personal jurisdiction  
10 over AFW, it would likely result in parallel litigation in the State of Maryland. The initiation of a  
11 parallel lawsuit in Maryland would result in an inefficient judicial resolution because it would  
12 require all parties to pursue separate Maryland counsel and would result in redundant discovery for  
13 both parties. A parallel lawsuit could also result in conflicting decisions that impair both courts'  
14 ability to progress through the litigation process.

15 Additionally, it is important to the United States to have the Central District Court of  
16 California as the forum. The United States asserts that much of the relevant evidence in this lawsuit  
17 is located in California. Opp'n at 15. Specifically, the United States asserts that physical evidence as  
18 well as several key witnesses are located in California. The Court finds the United States' argument  
19 to be compelling.

20 Accordingly, for these reasons, the Court finds that asserting personal jurisdiction over AFW  
21 is not unreasonable.

### 22 CONCLUSION

24 For the foregoing reasons, the Court DENIES Wholesale Fireworks's Motion to Dismiss and  
25 AFW's Motion to Dismiss. However, the Court GRANTS Wholesale Fireworks's Motion to Strike  
26 IN PART, and strikes the following references to California Civil Code section 3346:

- 27 1. Defendants are also liable to Plaintiff for wrongful injury to its timber, trees, and underwood  
28 pursuant to California Civil Code section 3346. FAC ¶ 58.

2. For double or triple damages for wrongful injury to Plaintiff's timber, trees, and underwood pursuant to California Civil Code section 3346. Prayer for Relief ¶ 2.

**IT IS SO ORDERED.**



Dated: September 27, 2024

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MAAME EWUSI-MENSAH FRIMPONG

United States District Judge